Minister's Speech at the Association for Canadian Studies Conference on "Canadian Rights and Freedoms: 20 Years Under the Charter"

Ottawa, April 18, 2002

> *"I believe that the duty to preserve fundamental rights and freedoms in Canada is not exclusive to the courts. It is first and foremost the responsibility of all citizens, Parliament and the Government"*
> *- Martin Cauchon*

Mr. Vice-president, Canadian Bar Association, honoured guests, ladies and gentlemen and dear colleagues...

> *- Chief justice John Richard of Federal Court of Appeal*
> *- Howard Pawley Former Premier of Manitoba*
> *- Morris Rosenberg*

As Minister of Justice and Attorney General of Canada, it gives me great pleasure to welcome all of you participating in this conference to mark the 20th anniversary of the enactment of the *Canadian Charter of Rights and Freedoms*.

This event, sponsored by the Association for Canadian Studies, is important for several reasons. First, it brings together a large number of the foremost experts in Canada. Furthermore, the various workshops will allow us to assess the vitality of our political ideals.

Thus, on behalf of all Canadians, I am proud to participate in this conference, which will enable us to measure the concrete effects of the *Canadian Charter* on the protection of fundamental rights and freedoms in Canada over the past two decades.

Although the following two concepts may seem contradictory at first glance, I believe that it was with both continuity and change in mind that the Charter was adopted and enshrined. The continuity of our most cherished liberal traditions, and changes made to the nature of the document as well as the role of the courts in Canadian society.

It seems obvious to me that the Charter's constitutional character and the power granted to the courts to declare inoperative acts which contravene it, have added a new dimension to fundamental rights and freedoms in Canada by reflecting a prevalent international trend.

In my opinion the impact of the Charter on the legal system is visible at four levels:

- Canadian society,
- government and public administration,
- the role of judges and courts, and
- the Canadian Charter was also a source of inspiration for law and the legal systems of many other countries.

The first impact of the *Canadian Charter of Rights and Freedoms* is on Canadian society.

Although during the first ten years of the Charter's existence, its interpretation was often tied to issues of criminal procedure, we have to admit that today — two decades later — the issues decided by the courts, more often and increasingly, directly affect Canadians'daily lives.

Whether it be tobacco advertising or advertising directed at children, the death penalty, funding for minority language education, equality rights — including rights regarding sexual orientation — or the right to privacy, not a day goes by that we don't read, see or hear media reports about how these issues personally affect Canadians.

Furthermore, it would not be an exaggeration to say that the *Canadian Charter of Rights and Freedoms* enjoys almost unanimous acceptance from the majority of Canadians. Indeed a public opinion survey made by Environics on behalf of the Centre for Research and Information on Canada in April of this year showed that 88% of Canadians have heard of the *Canadian Charter of Rights and Freedoms* and the same number say it is a good thing for Canada. In Quebec, it is viewed favourably by 91% of Quebecers. This is the highest percentage in all the regions of Canada.

However, if the *Canadian Charter of Rights and Freedoms* is so popular among Canadians, it is because it defines the common values shared by the vast majority of Canadians. Undoubtedly, this is what caused Pierre Elliott Trudeau to say: Quote "*...the Charter was defining a system of values such as liberty, equality, and the right of association that Canadians from coast to coast could share...*" unquote

The values defined by the *Canadian Charter of Rights and Freedoms* are inspired by the traditional values found in all major democracies; but it also includes values that I would call typically Canadian.

For example, the mobility right that allows Canadians to move freely within Canada and to earn their living in the province of their choice, the existing Aboriginal rights of the Aboriginal peoples of Canada, multiculturalism, the protection of the official languages of Canada and minority language educational rights are among the values that unite all Canadians.

The most significant impact the Canadian Charter has had on governments and public administrations is most certainly that of having fundamentally changed the way we work. These repercussions are perceptible on two levels, that is, on the legislative and policy development process and on governmental and administrative practices.

For example, it is incumbent on me, as minister of justice and, as prescribed by the *Department of Justice Act,* to examine every regulation made by the Governor in Council and every bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter.

I can therefore say that this important responsibility for gauging whether the laws and regulations

are in keeping with the fundamental rights and freedoms enshrined in the Charter lies first and foremost with Canadians, who, of course, are represented by Parliament and by the Government. However, besides the question as to whether or not a law or regulation complies with the guarantees under the Canadian Charter, the purpose of this review process is ultimately to ensure a fundamental societal objective; it involves tempering the rights of some with respect to the rights of others.

In fact, no right is absolute. The task of weighing individual rights against collective interests is carried out mainly by drawing on section 1 of the *Canadian Charter of Rights and Freedoms*.

Although this adaptation of individual rights to collective interests is not an exclusive phenomenon ensuing from the application of the Charter, you will have noticed that the Supreme Court of Canada has not only weighed individual rights against collective interests, but it has also taken into account the federal dimension in its interpretation of some constitutional guarantees.

Here, I must underscore *R.* v. *S.* (1990), in which the Court recognized that the application of differential treatment from one province to another, with respect to the alternative measures under the *Young Offenders Act,* not only was compatible with the rights to equality enshrined in section 15 of the Charter, but also constituted an intrinsic value of our federal system of government.

This leads me to consider the third impact of the *Canadian Charter of Rights and Freedoms*, that is, its impact on the courts.

Although it is true that the Canadian political system has been based on the doctrine of constitutionalism since Confederation in 1867, it seems undeniable that, since the adoption of the Canadian Charter and its entrenchment in the Constitution, the drafters of the Constitution have entrusted the courts with a greater role with respect to assessing the constitutionality of laws and government actions.

This greater role entrusted to the courts, which allows persons who feel that they were wronged to appeal to the courts, promotes democracy in that it "*gives more power to citizens.*" This is especially the case given that we implemented, and are still funding today, the Court Challenges Program to support court cases that deal with language and equality rights.

As you know, this ability of the courts to declare laws unconstitutional is at the origin of the argument that judges have too much power. Personally, I disagree for two reasons:

First, the courts' power to review the constitutionality of laws existed from the moment the Canadian confederation was formed in 1867. In effect, the federal political structure already allowed the courts to conduct a jurisdictional review of government activity, since the inevitable jurisdictional conflicts between the two levels of government would have been difficult to resolve without the contribution of the courts.

Secondly, it seems to me that the invalidation of legislative provisions by the courts is the exception rather than the rule. In fact, it would be false to claim that the number of laws invalidated by the courts is the most significant impact that the *Canadian Charter of Rights and Freedoms* has had on government activity. Actually, only a few laws have been invalidated by the courts. Considerably fewer than one would think.

Although the wording of the constitutional guarantees calls for, as was pointed out by the Supreme Court of Canada, a large and liberal interpretation so as to allow the evolution of our political ideals, that does not however mean that it is exclusively up to the courts to decide on important social issues. Quite the contrary.

The process of democratic discussion, which is sometimes evidenced through the invalidation of a

legislative provision by a court, is qualified by some, to use a well-known metaphor, as "dialogue". But be careful! This expression "dialogue", which is used to designate what I would call an "open societal discussion," seems to underestimate the role of participants other than the courts. Sometimes, we get the impression that "dialogue" means that Parliament and the Government only react to the decisions of the courts. I do not share this point of view.

In my opinion, the duty to preserve fundamental rights and freedoms in Canada is not exclusive to the courts; it is first and foremost the responsibility of all citizens, Parliament and the Government.

You will also see that in order for the courts, the last link in the chain, to be able to declare a legislative provision inoperative, they must have found that fundamental rights and freedoms were undermined as a result of the application of a law or government action. But, as I said before, the rigorous review process carried out by the Government and Parliament—not to mention a more significant culture of fundamental rights and freedoms in Canada, which results from twenty years of applying the Canadian Charter—makes the courts partners, rather than rivals.

In fact, it seems obvious to me that this "open societal discussion" between Canadians, Parliament, the Government and the courts is not only desirable, but indispensable in a modern constitutional democracy. It favours the balance of powers and allows for better administration of justice by validating substantial legislative objectives. As a matter of fact, I believe you will see that this "open societal discussion" is the key to the constitutional state. Whereas in a constitutional state, everyone *has* a role and *must* participate.

The final impact of the *Canadian Charter of Rights and Freedoms* that I am going to mention is on the law and legal systems of many other countries. In fact, the *Canadian Charter* has been a source of inspiration for many other democracies that have equipped themselves with instruments that protect fundamental rights and freedoms.

For example, New Zealand's *Bill of Rights,* which was adopted in 1990, was inspired by the constitutional guarantees entrenched in the *Canadian Charter*. This also applies to Supreme Court of Canada case law. Many of our highest court's decisions are frequently cited by the courts of numerous countries such as the United Kingdom, Ireland, New Zealand, South Africa, Sri Lanka, Uganda and Zimbabwe.

For instance in *State* v. *Zuma* (1995), a case from the Constitutional Court of South Africa, Justice Kentridge refers to Section 11(*d*) of the *Canadian Charter of Rights and Freedoms,* which bears a strong resemblance to the equivalent provision of their Constitution, and adopts some of the principles outlined by our Supreme Court.

Besides reflecting an international recognition of values shared by all nations, this emulation of the *Canadian Charter of Rights and Freedoms* and the Supreme Court of Canada decisions promotes an increased awareness of Canada and our democratic traditions throughout the world. I am particularly proud of that.

Although the *Canadian Charter of Rights and Freedoms* has had a significant impact on society, on the way governments and public administrations operate as well as on the role of judges and courts, I do not believe that it has created a revolution or that it is at odds with our legal system. Rather, it only confirms our democratic traditions and ideals.

By enshrining values shared by all Canadians from coast to coast to coast, the *Canadian Charter of Rights and Freedoms* has given a voice to ordinary citizens and, by that very fact, has consolidated the democratic values of Canadian society. By achieving this delicate balance between individual rights and freedoms and collective interests, the *Canadian Charter of Rights and Freedoms* is the guarantor of a fairer and more equitable society.

The Prime Minister who, as you know, was Minister of Justice when the *Canadian Charter of Rights*

and Freedoms was adopted and entrenched in the Constitution recently said that the Charter of Rights and Freedoms, despite the controversies and compromises that surrounded its preparation, is one of the best in the world. I tend to agree.

Finally, if I could make a wish on this occasion of the twentieth anniversary of the adoption of the *Canadian Charter of Rights and Freedoms*, I would wish that all Canadians from coast to coast understand that the *Canadian Charter of Rights and Freedoms*—which reflects our identity and establishes our common values—belongs to us. The *Canadian Charter of Rights and Freedoms*, it's ours. It's us!

Thank you and I hope your discussions are beneficial.

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